IN THE MATTER OF THE HUMAN RIGHTS CODE OF ONTARIO

and

IN THE MATTER OF THE COMPLAINT OF ASHIT KUMAR GOSH AGAINST DOMGLASS INC. AND OTHERS

INTERIM DECISION
(Motion for Adjournment)

INTRODUCTION

When the hearing into this matter resumed on October 29, 1991, to consider their motion to adjourn, counsel for the respondents, Mr. Bennett, filed a written Notice of Motion for "an order dismissing" the complaint, for "costs of the motion" and for "such further and other relief" as this board deems just. The grounds alleged in support of the motion were that there had been an abuse of process by the Ontario Human Rights Commission (referred to herein as "the Commission"), an abuse of process by delay in the service and in the hearing of the complaint, and that "such delays and abuses have caused prejudice to the respondents in mounting their defence and accordingly a just hearing of the complaint cannot now occur". The list of grounds also includes the following provisions: s. 33(1)(d) of the Human Rights Code, 1981, S.O. 1981, c.53; s.23(1) of the Statutory Powers Procedure Act, R.S.O. 1980, c. 484; ss. 7 and 11(b) of the Canadian Charter of Rights and Freedoms, Pt. I of the Constitution Act, 1982, being Sched. B of the Canada Act, 1982 (U.K.), 1982, c.11 (hereafter referred to as the "Charter").

Although the Notice of Motion seeks the dismissal of this complaint, in his oral presentation Mr. Bennett indicated that what was sought was an adjournment of the hearing pending the outcome of an application to the Divisional Court of the Ontario Court of Justice regarding these matters.

The Notice of Application to the Divisional Court (filed as Exhibit "A" to this motion) indicates that the respondents seek in that forum inter alia (and in the alternative): an order "in the nature of certiorari", either quashing the decision of the Ontario Human Rights Commission (hereafter referred to as "the Commission") to request the appointment of this board of inquiry, or quashing the decision of the Minister appointing it; an order "in the nature of prohibition" preventing this board from hearing the complaint; an injunction restraining it from proceeding with the hearing; a declaration either that its appointment is an abuse of process and beyond the jurisdiction of the Minister, or that the hearing of this complaint would be improper and beyond the jurisdiction of this board.

The grounds for the Application to the Court are set out at pages 4 to 6 of the Notice and are virtually the same as those advanced in support of this motion to adjourn, and they arise from the delays encountered from the time the complainant, Mr. Gosh, filed his complaint with the Commission in August 1985 until now.

FACTUAL BASIS UPON WHICH THE MOTION RESTS

The facts alleged in support of this motion are set out in the Affidavit of Tracey-Anne Pearce attached to the Notice of Application to the Court, and they were reviewed at length by Mr. Bennett.

Mr. Gosh commenced his employment with the respondent Domglass Inc. ("Domglass") in May of 1967. On May 27, 1985, he was placed by the employer on "short term disability" during the course of which projected six-months period he would have been receiving full salary and benefits. On June 26, 1985, however, he commenced an action in the Supreme Court of Ontario for damages for wrongful dismissal because of his race, colour and ethnic origin. A statement of Defence was served a month later.

Although Mr. Gosh's human rights complaint was received by the Commission on August 26 of that year, the Commission did not advise

the respondents of the complaint until January 10, 1986, some weeks after examinations for discovery of Mr. Gosh and Mr. Van Vliet of Domglass were held in the civil action in December, 1985. Domglass thereupon applied to the Supreme Court of Ontario for a stay of the civil action. That motion, which was successful, was heard in weekly court on November 25, 1986.

In granting the stay of the civil action Madame Justice McKinlay observed that "the Commission should be in a position at this time to decide on the appropriateness of recommending to the Minister the appointment of a board of inquiry". Mr. Bennett characterized this observation (wrongly in my opinion) as a "ruling", apparently implying that the subsequent delays were contrary to an order of the court. However, that observation was not a finding of fact that the Commission was in a position as of the date of her judgment to reach a decision as to whether to request the appointment of a board, nor was it a ruling to the effect that the Commission was required to do so without further delay. Indeed, it would appear from the affidavit of Ms. Pearce that the investigation of the complaint had not yet taken place, nor had there been any effort to effect a settlement. As these procedures are statutory requirements (s.32(1) of the Code) it is clear that Madame Justice McKinlay could not have found that the Commission was in fact ready to decide whether to make the request, nor could she have imposed on it any duty to do so.

In any event, the respondents heard nothing further until contacted in the fall of 1987 by Ms. Diane Frank, a Human Rights Officer, who attended at the Domglass premises in order to carry out an investigation of the complaint. The next contact with the respondents occurred in February of 1988 when Ms. Frank returned to the Domglass plant to continue her investigation.

The respondents heard nothing further until approached in August of 1988 by Mr. Glen Morrison, another Human Rights Officer who had taken over the file and was in the process of reviewing it.

Mr. Morrison scheduled a conciliation meeting for September 23, 1988 which Mr. Gosh and his former counsel failed to attend. There was then some correspondence with Mr. Morrison in which Mr. Bennett expressed concern regarding the delays already encountered. In his letter of March 6, 1989, Mr. Morrison explained why the delays were not his fault, and he asked the respondents to state their final position on the prospect of a settlement so that the Commission could decide whether to request the appointment of a board.

On July 20, 1989, Ms. Mary A. Samuel, yet another Human Rights Officer to whom the file had been transferred, wrote to Mr. Bennett seeking a reply to the unanswered letter of March 6th. On July 24th, Mr. Vic Marcuz, the Regional Manager of the Commission, advised the respondents that, having been unable to resolve the complaint through investigation and conciliation, the matter would be referred to the Commission for a decision as to whether to request the appointment of a board. Mr. Marcuz attached to his letter a copy of the report upon which that decision would be made and invited the respondents to forward any reply they would like included in the material to be considered by the Commission. In his August 15th reply to Mr. Marcuz, Mr. Bennett stated that the only submission he wished to add to the report was that the delays encountered were prejudicial to the respondents and that to proceed now would be an abuse of process.

On October 25, 1990, the respondents were advised that the Commission was requesting the appointment of a board to hear the complaint as amended on September 13, 1990, it having been decided to proceed in respect of part only of the original complaint. Mr. Bennett wrote to the Chief Commissioner on November 14, 1990, setting forth his reasons why he was seeking instructions to move to quash the appointment of a board should the Minister respond positively to a request for such an appointment. That letter does not seem to have called for a reply, and none was given.

The respondents were advised of my appointment on May 10, 1991 and this hearing was formally commenced by way of a conference call on May 28th at which time it was decided to resume the hearing on June 27th in order to hear the motion now under consideration. As it happened, Mr. Gosh had filed a request in December of 1990 for a reconsideration of the decision not to proceed with the deleted parts of the original complaint. Although it was decided to uphold the decision to amend the complaint, this mandatory reconsideration process took longer than anticipated when the June 27th date had been agreed upon with the result that the resumption of this hearing had to be postponed until October 29, 1991.

In March of 1989 the parent company of Domglass was purchased by "Stone Container Corp.", an American company with headquarters in Chicago, which two months later sold all of the assets of Domglass to "Consumers Packaging Inc.", releasing at the same time most of the head office workers formerly employed by Domglass, some few of those workers becoming employees of Stone Container Corp.

The individual respondents filed affidavits with the Notice of Application to the Divisional Court. The affidavit of William Forrest, who retired from Domglass in August of 1986, indicates (inter alia) that his recollection of events has faded. Kenneth Van Vliet, whose position at Domglass was terminated in 1988 resulting in a wrongful dismissal suit since settled, has made a similar deposition. Both David Harrison, who left Domglass in 1988, and Charles Fox, who retained his employment under the new owners of the former Domglass plant, state that they understand that a former supervisor of Mr. Gosh, one Robert Rae, whose evidence they say would have been of importance in responding to the allegations made against them in the complaint, passed away three or four years ago. They also claim to be unable to recall the names of other former co-workers whose evidence might assist in their defence.

APPLICATION OF RELEVANT LAW

In Re Cedarvale Tree Services and Labourers' International Union of North America, Local 183, [1971] 3 O.R. 832, at 841), Arnup J.A. noted that a board of inquiry such as this is "master of its own house not only as to all questions of fact and law falling within the ambit of the jurisdiction conferred upon it by the Act [by which it is established], but with respect to all questions of procedure when acting within that jurisdiction." He continued as follows:

> ... the Board should, when its jurisdiction is questioned, adopt such procedure as appears to it to be just and convenient in the particular circumstances of the case. ... It is also clear that such a tribunal is not required to bring its proceedings to a halt merely because it has been served with a notice of motion for an order of certiorari or prohibition. It is entitled, if it thinks fit, to carry its pending proceedings forward until such time as an order of the Court has actually been made prohibiting its further activity or quashing some order already made by which it assumed jurisdiction.

The basis for this motion to adjourn is that an application has been made to the Divisional Court to quash these proceedings and, notwithstanding the broad discretion outlined above, when considering whether to accede to such a motion I ought to be guided by relevant precedent. In similar circumstances in Potapczyk v. MacBain, 5 C.H.R.R. D/2302, the tribunal adopted the following guidelines (at p. D/2304):

> There is unanimity among all counsel that a tribunal when faced with an application for an adjournment should determine whether the issue that is pending in the court is a substantial one worthy of trial and judicial deliberation. If there is a substantial issue, then the question of an adjournment resolves itself on the basis of the balance of convenience.

While counsel were similarly of the unanimous view that this ought to be followed in the present proceedings, they disagree not only in respect of the effect of its application to the present

circumstances, but as to the scope of the second stage of this test. I shall deal with the two stages of this test separately.

Is the Issue Pending in the Court Sufficiently Substantial?

Mr. Bennett submitted that the length and effect of delays in pursuing the complaint, and the reconsideration by the Commission of its earlier decision to delete certain parts of the original complaint, disclose a substantial issue "worthy of trial and judicial deliberation" and that the first stage of the test has therefore been satisfied. A number of authorities were referred to in support of that assertion the first of which is Commercial Union Assurance et al. v. Ontario Human Rights Commission et al. (1980), 30 Admin. L.R. 183. That decision of the Ontario Court of Appeal was one of two case advanced in support of the argument that there was a serious issue regarding denial of natural justice (or procedural unfairness) warranting judicial consideration. The other was the decision of the Federal Court of Canada (Trial Division) in Motorways Direct Transport Ltd. v. Canadian Human Rights Commission, the unedited report of which bears the reference "[1991] F.C.J. No. 338 Action No. T-29-91".

In Commercial Union Assurance it had been decided by the Commission not to request the appointment of a board to hear a complaint received some thirteen months previously. However, following the complainant's request for reconsideration pursuant to s.36 of the Code the Commission, some seventeen months later, reversed its earlier decision and requested the Minister to appoint a board. In the meantime, a key witness for the respondent had been killed. The respondent applied for judicial review and got an order from the Divisional Court quashing the decision of the Commission to request the appointment. The appeal was dismissed, Mr. Justice Lacourciere concluding on behalf of the court (at p. 187) with these words which were quoted by Mr. Bennett:

> However, having regard to the delay and resulting prejudice and to the admitted procedural unfairness of

> the first reconsideration, the respondent has good reason to fear that a fair decision cannot be arrived at by the same body and that a second reconsideration will inevitably result in unfairness, in the circumstances. We agree. [The emphasis is mine, not counsel's.]

Counsel for the respondents suggested that this statement "rolls together two issues, the issue of delay and the procedural problems of unfairness. But the court considered both of those issues and considered the delay and the resulting prejudice of the delay as sound reason for quashing the appointment of the Board of inquiry and dismissing the appeal." (Transcript of argument, p. 10.) Since a key witness in the present proceedings has also died and the delay is even greater, the **Commercial Union Assurance** case might at first seem compelling. However, in my opinion, the most important factor in that case was that the officer in charge of the file failed to provide the respondent with information as to the basis upon which the matter was being reconsidered and with an opportunity to reply as required by the Code. This procedural unfairness was admitted by the Commission which nonetheless sought to have the matter remitted to it for a second reconsideration.

As the emphasized part of the above-quoted passage indicates, the decision in **Commercial Union Assurance** appears to have been based on the respondent's reasonable apprehension of bias should the Commission be given a third opportunity to consider the matter, and bias is certainly not an issue before me. In any event, the refusal to remit the matter to the Commission in the circumstances of that case cannot be taken to have established that delay, either alone or in conjunction with the death of a witness, taints with procedural unfairness an initial consideration as to whether to request the appointment of a board. And where upon reconsideration the Commission adheres to the decision that the complainant objects to (as in the case before me), the respondent can hardly claim to have suffered procedural unfairness by that process. Besides, even though it results in a further delay of the hearing, as it is a mandatory process that inevitable delay is not prejudicial per se.

The **Motorways** case involved a complaint of discrimination on the ground of disability, to wit, alcoholism. The complainant had a dismal employment record with Motorways going back to 1963 involving disciplinary action taken by eight different supervisors only one of whom was any longer available to give evidence. Such incidents included intoxication on the job. The complainant was finally dismissed in December of 1984. He grieved. His grievance was dismissed by an arbitrator in March of 1985. He then filed a first complaint in February 1987, which the Commission did not decide to deal with until September of 1988. A second complaint was filed in July of 1988, and the Commission's decision to accept it was made in November of that year.

In June of 1990, although certain investigations had already been undertaken by others, the officer to whom the Commission had assigned the file in January of 1989 decided to commence her investigation into the matter by attempting to arrange a meeting to review documents and identify available witnesses. Motorways then brought this motion to quash the two decisions accepting the complaints and to quash the continuation of the Commission's investigation. Having found that the Commission had valid reasons for accepting the complaints such that it had not acted with procedural unfairness despite the prolonged delay in doing so, Walsh J. went on to quash the further investigation of the matter because of the total delay from the filing of the complaints and the considerable additional delay that would otherwise inevitably be encountered before a hearing could be held.

In deciding that that delay, which was found to be highly prejudicial to Motorways, was sufficiently unreasonable to warrant the making of these orders, Walsh J. relied on the criteria articulated in **Saskatchewan Human Rights Commission** v. **Kodellas and Tripolis Foods Ltd.**, 10 C.H.R.R. D/6305 (which is dealt with more fully below), but distinguished that case regarding the position of corporations.

In **Kodellas** an order was made preventing the board from proceeding against the individual respondent whose s.7 Charter right had been breached by the unreasonable delay, but a similar order on behalf of the corporate respondent was denied because that provision is not available to corporations. However, in **Motorways** Walsh J. held that the motion was brought by the respondent as plaintiff in a common law action in respect of which the Charter played no role. In Mr. Bennett's submission, Domglass is entitled to that same consideration. Walsh J. made the point in the following terms (at p. 12 or 13 of the unpagenated copy of the report provided to me, each page of which appears to reproduce the last half of one page of original text, followed by the first half of the next):

> The Kodellas case is distinguished on the basis that here we are dealing with a common law action by a corporate respondent which cannot avail itself of section 7 of the Charter. ... Without relying on section 7 of the Charter, however, it appears to me that the criteria set out in Kodellas as to what is an unreasonable delay are also applicable in considering duty of fairness.

With all respect, I have some difficulty in reconciling that argument with **Kodellas**. Although a corporation cannot avail itself of the rights conferred by s.7 of the Charter, there does not appear to be any reason to refuse to extend to it the protection afforded by the rules of natural justice. If that is so, the question then becomes whether unreasonable delay (at least as it is determined by the **Kodellas** criteria) is per se a breach of these rules. Either such unreasonable delay is in itself a breach of natural justice and therefore, independently of s. 7, constitutes a basis upon which to stay the proceedings, or it is not. If it is, it seems odd that the Court of Appeal in **Kodellas** refused to stay the proceedings against the corporate respondent despite the breach of natural justice which (ex hypothesi) it must have found. If it is not, then the argument is impaled on the invalidity of its first premise.

The answer to this apparent conundrum seems to me to lie in recognizing that the ignominy visited upon the respondent by reason of the making of the specific complaint and the unreasonableness of the length of time he or she is subjected to it are not separate and independent reasons for finding a breach of section 7 of the Charter. Rather, it was the force of their combined effect that was held in **Kodellas** to have infringed the Charter rights. As Lamer J. (as he then was, in **Mills** v. **R.**, [1986] 1 S.C.R. 863) was quoted in **Kodellas** as saying (at D/6308):

> ... the concept of security of the person is not restricted to physical integrity; rather, it encompasses protection against "overlong subjection to the vexations and vicissitudes of a pending criminal accusation." These include stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors ...

The Court of Appeal in **Kodellas** then equated an accusation of sexual assault in criminal proceedings with a similar accusation by way of a complaint in human rights proceedings and concluded that the latter entails the same vexations and vicissitudes as the former, including the stigmatization, loss of privacy, stress and anxiety of the party accused of the misconduct. However, that invasion of the security of the person does not of itself invoke s.7 of the Charter since it is an unavoidable consequence of the process; it is only if that invasion is unreasonably prolonged that s.7 is infringed. And the delay itself, however unreasonable in terms of administrative bungling and the like, does not infringe the provision where there is in fact no invasion of the security of the person. Consequently, I do not read **Kodellas** as propounding the proposition that delay that is unreasonable for whatever reason is *ipso facto* a breach of the rules of natural justice.

It should also be noted that, even though Chief Justice Bayda in **Kodellas** found that s.7 of the Charter had been infringed, he felt that staying the proceedings would be unjust in that it would deprive of all remedy the innocent complainants who had not caused

the delays in question. Mr. Justice Wakeling thought that the right of the respondent should take precedence over those of the complainants in the circumstances. However, while Mr. Justice Vancise thought that a stay was a just and appropriate remedy, he reached that conclusion only because s.7 of the Charter could not apply to the benefit of the corporate respondent with the result that the complainants' rights were not left entirely without means of redress. He stated that:

> [At p. D/6326] In balancing these competing rights one must not forget that there are two respondents: Mr. Kodellas, the alleged wrongdoer, and Tripolis Foods Ltd., the employer of both Mr. Kodellas and the complainants. [And at p. D/6327] ... if the complainants were left with no remedy I would have used that factor as determinative in balancing the rights of the various parties. The Charter, which is designed to protect the rights of individuals in dealings with governments, should not be used to deprive people of their rights.

Thus, a majority of the Court of Appeal felt that even in the context of s.7 of the Charter the complainants' rights were to be weighed in the balance, and that if the effect of a stay would be to wipe out those rights the balance should be tipped in their favour. One might have thought this would apply a fortiori in a case like **Motorways** in which the Charter has no application and interests that are being balanced are purely common law rights. In any event, owing to **Bhaduria** v. **Board of Governors of Seneca College**, [1981] 2 S.C.R. 181), any rights of Mr. Gosh arising out of the alleged discrimination would be eliminated should these proceedings be stayed as against all the respondents. In the light of **Kodellas**, that consequence is enough to find that a stay should not be granted to them all; but, to reach that conclusion, it would have to be held that Domglass cannot succeed on its motion on the basis that the delays constitute an infringement of natural justice. And if Domglass cannot succeed on that basis, neither can the individual respondents who are then left to rely on the Charter which is unavailable to the corporate respondent.

It seems rather curious that the stay of proceedings against Kodellas was based on a breach of his personal security constituted by an excessively prolonged subjection to vexations and anxieties associated with the stigma of the particular complaint; yet, in refusing to stay the proceedings as against the corporation, that stigma and its consequences were allowed to continue unabated. In fact, as observed by McLellan J. in the court below, his position would be worse since "there would be even less safeguards because technically he would not be a party to the proceedings." (8 C.H.R.R. D/3712, at D/3721.) The real relief to Mr. Kodellas was that, even if in the end he were found to have sexually assaulted the complainants thereby rendering the other respondent liable, he would have no personal obligation to pay damages. And even that apparent relief was rather hollow since, as a co-owner of the restaurant, any payment of damages would ultimately affect him personally. This was what caused the lower court in **Kodellas** to grant the stay against both respondents. The fact that the Court of Appeal in effect permitted the invasion of Mr. Kodellas's right to the security of his person to continue demonstrates the great importance that at least two of its members attached to the complainants' rights.

Finally, if my criticism of **Motorways** (which I do not regard as binding upon me) is misplaced, there remains the need to compare the unreasonable character of the delay therein and that involved in the circumstances before me. I find significant the following observations made in **Motorways** by Walsh J. (at page 13 or 14):

> ... it appears to me that the criteria set out in Kodellas as to what is an unreasonable delay are also applicable in considering the duty of fairness. Since the date of the investigator's report that an inquiry was warranted, no decision has yet been made to initiate it. An examination of the record discloses, however, that this will most likely be the result of the report in view of the issues which the Commission itself has indicated it wishes to have determined in this case. I have already indicated that the prejudice to Motorways is great. To require it to await an investigator's report, referral to the Commission, and enquiry before the

> Commission involving very extensive evidence and expense which may well be a waste of time for all parties does not seem justified. Far too much delay and prejudice to the plaintiff has occurred already which justifies a conclusion that the decision to proceed with an investigation is in itself a decision approved by the Commission. This has not been made fairly in regard to the Plaintiff. ... [After indicating that the decisions to accept the complaints were properly accepted, the reasons then conclude as follows.] ... What I am now deciding however is, assuming the complaint was validly accepted, whether the delays from February 9, 1987 to September 27, 1988 while the Commission was deciding whether to accept the complaint or not, and more especially the subsequent delays in investigating this and the subsequent Section 10 complaint with respect to which complaints Ms. Redding [the Human Rights Officer] only commenced her investigation in June of 1990 was not unacceptably long, and that the delays which are so prejudicial to Plaintiff breach the duty to act fairly. I therefore direct that a writ of certiorari be issued against Defendant quashing its decision to proceed with an investigation of [the] claims against the Plaintiff and a writ of prohibition preventing it from proceeding with these claims.

Counsel for the Commission, Mr. Hart, submitted that **Motorways** can be distinguished from the present situation. In the **Motorways** case the appointment of a board had not yet been requested, and what was successfully sought was to have quashed the Commission's decision to continue the investigation after it had lain dormant for a long period following earlier protracted delays preceding the decisions to accept the complaints. In the present case, what is sought from the Divisional Court is an order to quash either the decision of the Commission to request the appointment of this board, or the decision of the Ministry of Citizenship to appoint it.

While it is clear that a decision to continue an investigation is quite different from a decision to request the appointment of a board, I am not entirely convinced that that distinction is such that the former can be quashed because of the delay in making it while the latter cannot. However, in **Motorways**, although coloured by the cumulative effect of earlier dilatoriness, the delay that

proved fatal to the decision under attack was prospective. By way of contrast, there was no prospect at the time they were made that the decisions under attack in the present proceedings would in and of themselves risk unreasonable future delay, and in fact no such delay has materialized. For that reason, even if it were correct and otherwise applicable, I would distinguish the **Motorways** case and follow the clear trend of the Ontario decisions dealt with below, some of which involved delays comparable to those that have occurred in this case with similar problems of fading memories and difficulties in locating witnesses.

I find nothing in the material placed before me that would support an allegation of administrative unfairness, or denial of natural justice. Although there have been serious delays along the way (as prejudicial to the complainant as to the respondents, it must be noted), as Mr. Hart pointed out, the respondents have been fully aware of the subject matter of the complaint since the filing of the statement of claim in the civil suit in 1985; they had an opportunity to examine the complainant in December of that year in relation to that action; they were served with the complaint in January of 1986 and they were provided with the Case Summary forming the basis upon which the Commission's decision to request the appointment of a board was made in September 1988: "They were fully aware of the case, of the basis upon which the Commission would make its decision, and the case that they had to meet, and there is nothing before [this board] in this material that suggests otherwise." (See transcript of argument at pp. 72 and 73.)

In my opinion, the material submitted to me does not warrant a finding of administrative unfairness constituting a substantial issue for judicial consideration, and I turn now to the question whether the delay preceding this hearing is unreasonable and as such constitutes such an issue. Mr. Bennett based his submission in this regard upon **Kodellas** and **Douglas and Jonlee Holdings Ltd. v. Saskatchewan Human Rights Commission**, 11 C.H.R.R. D/240.

As already noted, **Kodellas** involved two complaints of sexual harassment in which the conduct alleged included sexual assault, it being held that the delay in pursuing those complaints was unreasonable and deprived the individual respondent of his right to "life, liberty and security of the person" as provided by s.7 of the Charter which provision, however, was not available to the corporate respondent against which the proceeding was not stayed. The factors that the court had regard to in determining whether the delay was sufficient to invoke s.7 of the Charter included the reasons for that delay, whether it was prima facie unreasonable, the adequacy of institutional resources, the potential prejudice to the accused wrongdoer and the possible prejudice to the complainant and to society.

The **Douglas** case was also one of sexual harassment. Although Lawton J. states (at p. D/243) that "there are two years and seven months between the serving of the complaint on October 17, 1985 and the hearing date of May 24, 1988", he quotes passages from Douglas's affidavit including the following observation (at p. D/244): "It has been four years since I was served with Ms. Marcotte's complaint". Whatever the actual delay was, it was found to have been prima facie unreasonable in that there was nothing to indicate that a process of the kind in question should take that long. Lawton J. found that the delay was caused exclusively by the Commission whose plea of inadequate resources did not counter the finding of administrative bungling, and he allowed the application of the individual respondent because of the violation of his s. 7 Charter rights. The application by the corporate respondent was dismissed on the basis that this provision does not apply to corporations.

Mr. Hart argued that **Kodellas** and **Douglas** are distinguishable from, and inapplicable to, the kind of situation involved in the present proceedings. A close reading of **Kodellas** shows that the circumstances of that case were taken to have fallen within the purview of s.7 of the Charter only because the complaint therein

amounted to an accusation of sexual assault. In order to invoke s.7 of the Charter successfully it is necessary, first, that the "life, freedom or security of the person" be at risk. While this is so in respect of criminal proceedings, it is not normally so in respect of proceedings under human rights legislation where the nature of the complaint usually entails no such risk. However, Bayda, C.J.S. indicated that there are provisions in some human rights legislation that might be regarded as quasi-criminal in character and that proceedings in respect of them might place at risk the respondent's s.7 rights. Thus, the Chief Justice states (at p. D/6308) that:

> For the purpose of determining the effect upon the "security of the person" I see no logical distinction of substance between the subjection to the vexations and vicissitudes of "a pending criminal accusation" based upon sexual harassment and sexual assault and the subjection to the vexations and vicissitudes of a pending accusation in penal (i.e., quasi-criminal) proceedings under s.35(2) of the Code, of discrimination based upon sexual harassment and sexual assault. It is but a small step from there to find that for the same purpose no distinction of substance can be made between an accusation in a penal proceeding under the Code and an identical accusation in remedial proceedings under ss. 27 to 33 of the Code. [Emphasis added.]

Mr. Hart submitted that, even if **Kodellas** and **Douglas** are applicable to remedial proceedings under the Ontario Code regarding complaints of sexual harassment, those decisions are inappropriate in the context of complaints that are devoid of any criminal or quasi-criminal character. Indeed, that distinction does seem to constitute the stairway up which Chief Justice Bayda's reasoning ascended to his conclusion in **Kodellas**, stepping from criminal proceedings, to quasi-criminal proceedings, to proceedings involving accusations of conduct of like gravamen. The same point seems implicit in his discussion in **Kodellas** (at paras 44806 and 44807) of his earlier decision in the **Pasqua Hospital** case (8 C.H.R.R. D/4242). Vancise J.A. makes essentially the same point in **Kodellas** by linking s.7 of the Charter to the specific nature

of the conduct complained of, rather than by linking it to the mere existence of a complaint (see p. D/6319).

Mr. Bennett argued that s.7 of the Charter does not require as a "point of entry" (as Mr. Hart put it) that the conduct be of a kind that has "some parallel in the Criminal Code." While it is not clear that that was the implication of Mr. Hart's submission on this point, I would agree with Mr. Bennett that the reasoning in **Kodellas** (particularly in the judgment of Vancise J.A.) goes beyond that. It seems to me that the test (or "point of entry") is whether the kind of misconduct in question is such that its allegation would cause a normally sensitive person accused of it to suffer the kind of distress the Court of Appeal described. While it was submitted that a complaint of racial discrimination, for instance, would have that effect in today's society, I do not want to express any opinion in that regard on specific kinds of complaints not before me. What is crucial is that the complaint these respondents have applied to the court to have dismissed is that of discrimination on the basis of handicap. In my view, that complaint is not an accusation that impacts upon the security of the person within the meaning of that expression as interpreted in **Kodellas** such that if left unresolved for an unreasonable time it would infringe s.7 of the Charter. If that were so, one might as well say that **Kodellas** constructed a fourth step to be climbed, leading from the level of "proceedings involving accusations of conduct of like gravamen" to that of "any complaint whatsoever made under human rights legislation."

A much narrower distinction or "point of entry" was defined in the Queen's Bench Division by Noble J. in **Saskatchewan Transportation Company v. McDougall** (1989), 10 C.H.R.R. D/5874. There (as here), the applicants sought an order to quash the appointment of a board to hear a complaint of discrimination because of physical disability. It was alleged that there had been unreasonable delay breaching the ss.7 and 11(d) Charter rights of the company (S.T.C.) and of the individual respondent to security

of the person and to a timely trial. Having found that the delay was not in fact unreasonable, Noble J. went on (beginning at p. D/5876) as follows:

> Even if I am wrong in my conclusion that this is not a case of unreasonable delay, I cannot agree that the arguments advanced in Kodellas that his right to security of the person had been violated apply to the facts of this case. In Kodellas the complaint was one of sexual harassment, and because of the nature of the charges against him McLellan J. [in the Queen's Bench Division] concluded that he was open to the stigma, stress and anxiety that such allegations would subject any person to without the corresponding protection and safeguards that the criminal law provides to an accused person. ... [Then, at p. D/5877] In my opinion, we are here confronted with a complaint of discrimination which is entirely different both as to its nature and its ramifications upon the alleged discriminator. Neither S.T.C. nor Ron McPherson can claim to be stigmatized or otherwise subjected to stress or anxiety as a result of Mr. McDougall's complaint. There is no threat to the security of the person.

In similar vein, the board in the **Dennis** case, supra, rejected the argument that the extensive delay between the filing of the complaint in 1985 and the appointment of the board in 1990 breached s.7 of the Charter. The argument was described (at D/289) as not a strong one, and it was observed that:

> ... It would be a rare situation, if any, in which human rights proceedings affected the "security of the person." As the Federal Court concluded in MacBain v. Canada (Canadian Human Rights Commission), 5 C.H.R.R. D/2214 at D/2219:
>
> > I am not persuaded the right to "life, liberty and security of the person" includes interference with one's good name, reputation or integrity.

In my opinion, the filing and pursuit of a human rights complaint does not in and of itself constitute a threat to the security of the person of the respondent regardless of the nature of the conduct complained of, and I have concluded that there is nothing in the nature of the alleged conduct that is the subject

of the present complaint that places Charter rights at risk.

Counsel for the respondents also submitted that their rights under s.11 of the Charter had been infringed, relying in that regard on the same authorities argued in support of his contention with respect to s.7. Section 11(b) of the Charter states that "Any person charged with an offence has the right ... to be tried within a reasonable time."

Mr. Hart on behalf of the Commission pointed out that the trial judge in **Kodellas** had concluded that as inquiry proceedings under the Code were not criminal in nature the person complained about could not be said to have been charged with an offence, and that therefore s.11(b) has no application to such proceedings. He also pointed out that this reasoning was adopted in the **Douglas** case some months after the decision of the Court of Appeal in **Kodellas**. In any event, the jurisprudence of this province makes it clear that s.11(b) of the Charter does not apply in respect of remedial proceedings under the Ontario Code. I consider that point sufficiently settled as to make it unnecessary to do more than list a number of the authorities: **Commodore Business Machines Ltd. v. Olarte et al.** (1985), 6 C.H.R.R. D/2833; **Shepperd v. Bama Artisans Inc.** (1988), 9 C.H.R.R. D/5049; **Gohm v. Domtar Inc. (No. 1)** (1989), 10 C.H.R.R. D/5968; **Quereshi v. Central High School of Commerce** (1988), 9 C.H.R.R. D/4527; **Dennis v. Family and Children's Services of London and Middlesex** (1990), 12 C.H.R.R. D/285; **Maddox v. Vogue Shoes et al.** (unreported Ontario Board of Inquiry decision, April 8, 1991).

The point seems to have been conclusively made by the Supreme Court of Canada in **Wigglesworth v. The Queen** (1987), 45 D.L.R. (4th) 235, wherein Madame Justice Wilson, speaking for the court, said (at p. 247):

> It is my view that the narrower interpretation of s.11 favoured by the majority of the authorities referred to above is in fact the proper interpretation of the section. The rights guaranteed by s.11 of the Charter are available to persons prosecuted by the state for

> public offenses involving punitive sanctions, i.e., criminal, quasi-criminal and regulatory offenses, either federally or provincially enacted.

For all of these reasons I find that the respondents have not satisfied the first branch of the test by which it is agreed that I should be guided in adopting such procedure as appears to me just and convenient in the circumstances of this case. However, even if I am wrong in that respect, I am also of the view that the respondents have not met the second branch of the test either for the reasons that follow.

The Balance of Convenience

Mr. Bennett, who seemed to deal with this second part of the **MacBain** test as though only private interests were in question, listed (without reference to supporting authorities) factors he said case law required to be considered in determining where the balance of convenience lies.

One of the factors referred to by Mr. Bennett consisted of "equitable considerations such as the conduct of the parties," and he submitted that "the conduct of the Commission in this case is an outrage." (Transcript of argument, p. 31.) However, I do not find in the circumstances alluded to anything that would render the conduct of the Commission "outrageous." There is nothing shocking in the fact that the Commission did not advise the respondents of the complaint until a little over four months after its receipt. The evidence shows that the complainant was also notified at that same time of the acceptance of his complaint. Nor do I find shameful the fact that, prior to notification of the complaint, the civil litigation led to the examinations for discovery of one (and only one) of the respondents, and of the complainant as well. Mr. Gosh was not then aware that his complaint had been accepted by the Commission. The Commission could not prevent the pursuit of the civil action simply because it had received a complaint that was in substance the same. The implication in the material filed with the Notice of Application to the Divisional Court that there was

something collusive between the complainant and the Commission simply because this examination for discovery of one of five respondents occurred is misplaced. There was nothing wrongful, let alone outrageous, in continuing that civil action until it was stayed a year later upon application by Domglass to the Supreme Court of Ontario. And, as already indicated, McKinlay J.'s observation that the Commission should be in a position at this time to decide whether to request the appointment of a board was not some outrageously ignored ruling. Finally, the length of the delay is not per se outrageous.

Another of the factors to which it was suggested regard must be had was "damage to the parties", and it was maintained that the respondents had suffered such damage as to tip the balance of convenience in their direction. Firstly, it was said that they cannot properly defend against the allegations this long after the fact. This simply repeats the allegation of prejudicial delay with which I deal elsewhere. Secondly, it was pointed out that they will incur unrecoverable costs should the hearing proceed. However, as was pointed out by Mr. Wright, counsel for the complainant, Mr. Gosh has incurred the same delays in having his complaint dealt with. He labours under the same difficulties regarding witnesses, fading memories and the like, and he, too, will incur unrecoverable costs. While most of the delays encountered thus far are not the respondents' fault, they are not the fault of the complainant either. Both the initiation of a civil action by Mr. Gosh and his later decision to require a review of the Commission's decision to delete parts of his original complaint contributed to the overall delay. However, delay involved in the exercise of such rights cannot be attributed to fault. And it might be remarked in passing that Mr. Gosh was himself exasperated by the delays and at one point sought the intervention of the Ontario Ombudsman in an attempt to have the process speeded up.

In weighing Mr. Gosh's interests in the balance it is to be noted that not only did he do nothing untoward in respect of the delays that have occurred, but has been seeking vindication of his complaint for this same period of time and, since the burden of proof in these matters is not on the respondents, Mr. Gosh is placed in any even more difficult position in respect of evidence through the passage of time. While further delay to await the outcome of their application to the court might not seem to the respondents at this point to be materially significant, that further delay is clearly of material significance to the other parties. Finally, with respect to the weight to be given to the complainant's interests, I have already indicated that one member of the Court of Appeal in **Kodellas** denied a stay of the proceedings precisely because he felt that it would eradicate the complainants' rights, and another member of that court was prepared to refuse a stay as against the individual respondent had there not been a corporate respondent against whom the proceedings could continue.

Without minimizing the delays attributable to the Commission, the jurisprudence makes it clear that the respondents' own delay in seeking judicial review of these matters weighs heavily in the balance. While notable delays occurred during the administrative processes engaged in by the Commission's officers, that is a matter more properly to be taken into account by the Court in dealing with the application to quash these proceedings. (See the extract from **Hyman** v. **Southam Murray Printing (No. 1)** (1982), 3 C.H.R.R. D/617 quoted below.)

As Mr. Hart pointed out, since early November of 1990 the respondents have been in as good a position to apply for judicial review as they were when they finally did so on October 27, 1991. Not only have they waited all this time to make that application, but counsel indicates that the time it will take to have it dealt with (even, one presumes, if they are unsuccessful) "is not going to make a material difference to the applicant, and it certainly won't to the Commission." (Transcript of argument, p. 31.) In the

MacBain case the board decided the issue of balance of convenience against the respondent in large part because of his delay in applying to the court. The board stated (at D/2306) that it was not:

> ... convinced that there is any balance of convenience in favour of Mr. MacBain. It is in this context that one must take into account the question of the delay in Mr. MacBain bringing the Federal Court proceeding. He has put himself in this position by reason of his tardiness and he is now seeking an indulgence from the Tribunal.
>
> It is clear that in this case credibility will be very much in issue and much may well depend on the memory of witnesses. The sooner they testify before the tribunal the fresher and more probative will be their evidence. Moreover, the dispute that is brought before this Tribunal is not one just involving private parties. It is in the public interest to have allegations of discrimination dealt with expeditiously not only to permit relief to the complainant if the complaint is substantiated, but also in the broader context of fostering human rights in the community at large. ...
>
> Accordingly, the respondent, Mr. MacBain, having put himself in this position of seeking an adjournment at this late hour and weighing the possible adverse consequences to the parties and to the public at large of either proceeding or adjourning, we have come to the conclusion that the balance of convenience clearly favours proceeding with this hearing as expeditiously as possible.

In any event, as **MacBain** itself makes clear, in proceedings under the Code the overriding consideration is the public interest. Although a complainant is a party to the proceedings, it is the Commission (which is not a private party) that has the carriage of the case. I fully agree with the analyses made and conclusions reached in this regard in **Tomen** v. **O.T.F. (No. 1)** (1990), 11 C.H.R.R. D/97 and **Meissner** v. **506756 Ontario Ltd. (No.1)** (1990) 11 C.H.R.R. D/94, both being decisions of Ontario boards of inquiry.

In the **Tomen** case the board was asked for an adjournment pending the disposition by the Divisional Court of an application to quash the proceedings. It was at the same time requested to

adjourn pending the outcome of an appeal before the Ontario Court of Appeal in respect of a matter central to the proceedings before the board. Before the board had an opportunity to decide upon these motions the Divisional Court dismissed the application for judicial review. That court had also been asked to grant a stay of the proceedings under the Code pending the outcome of issues then before the Court of Appeal, and it offered three reasons for refusing to to do so. Any stay could conceivably be a lengthy one. The dispute was not simply between private parties: "it was not merely a "family" matter" and, "As a matter of balance and convenience, taking into account the public interest, no stay should be granted." Finally, the Court found the motion to it premature because the issue of a stay was at that time before the board whose decision was pending.

A board's discretion must be exercised within the framework of the law by which it has been established - the Ontario Human Rights Code in this case. As was pointed out in **Meissner** (at p. D/95):

> It is clear from the preamble and scope of the Code that the public interest is central to the legislation. The public interest includes and transcends the interests of complainants and respondents. At the core of the public interest is the vindication of those rights identified by the Code as human rights. The Code imposes a responsibility upon boards of inquiry to hear complaints about the violation of those rights and to be expeditious in adjudication. Hearings must be commenced within thirty days of the board's appointment (s.38). The board must release its decision within thirty days of the conclusion of the hearing (s.40).

In view of the overriding public interest and the board's duty to act expeditiously following its appointment I would agree with the opinion expressed in **Meissner** (p. D/96) that the test for exercising this discretion is that which is set out in the **Hyman** case, supra, in which the board (at p. D/621) said that:

> ... Having been assigned ... a statutorily defined task of undertaking an inquiry to ascertain facts, the board

> of inquiry should proceed to attempt to do so, notwithstanding the passage of considerable time, unless the passage of time has made fulfilment of its task impossible. In the absence of such, admittedly unlikely, circumstances, the proper course, in my opinion, is for the board of inquiry to proceed ...

I share the view expressed in **Meissner** (at p. D/96) that a board of inquiry under the Code must proceed with its hearing "unless the passage of time has made the fulfilment of its task impossible." And I, too, find that that threshold has not been met in the situation before me. The length of time that has passed since the conduct complained of is most regrettable; but there have been a great many cases in which similar delays have not prevented the hearing from being held. (Indeed, Mr. Hart referred to an unreported decision of Mr. Gorsky who decided to proceed with a hearing under the Code despite an eighteen year delay.) Thus, in my opinion, the balance of convenience in the circumstances before me does not favour the granting of a stay of these proceedings.

DECISION

For the reasons I have stated, the motion for an adjournment of these proceedings is dismissed, and the hearing on the merits of the complaint will go forward.

Dated this 22nd day of November, 1991

H.A. Hubbard,
Chairperson